

<https://helda.helsinki.fi>

Book Review : The Foundations of the EU as a Polity, by
Massimo Fichera. (Cheltenham: Edward Elgar Publishing, 2018)

Husa, Jaakko

2019-12-02

Husa , J 2019 , ' Book Review : The Foundations of the EU as a Polity, by Massimo Fichera.
(Cheltenham: Edward Elgar Publishing, 2018) ' , Common Market Law Review , vol. 56 , no.
6 , pp. 1765-1767 .

<http://hdl.handle.net/10138/310255>

cc_by_nc_sa
publishedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

Massimo Fichera, *The Foundations of the EU as a Polity*. Cheltenham: Edward Elgar Publishing, 2018. 224 pages. ISBN: 9781785363894. GBP 75 (eBook: from GBP 22).

Addressing European integration from the viewpoint of constitutionalism and security is a tall order. Nonetheless, Fichera argues that security is the ideal prism through which we should inspect the European project. Quintessentially, Fichera perceives European integration as a process, which is completed by the creation of the Area of Freedom, Security and Justice. The theoretical framework for the discussion and analysis is based on a fundamental assumption according to which we should regard the EU as a polity. Fichera combines theoretical and doctrinal analysis in a manner that should be of interest not only to EU lawyers, but also to those interested in legal theory, political science and even policymakers. What this book offers is a holistic approach to the EU.

The structure of the book is straightforward. There are no separate chapters for introduction and conclusion, and the book starts, without spilling too much ink on formalities, with the crisis of the EU and ideas of European constitutionalism. The second chapter deals with constituent power and European integration, while chapter three analyses the principle of proportionality. These chapters clearly add to the body of existing literature in the field, by proposing a kind of middle way in between EU optimism and EU scepticism and between law and politics.

The argument advanced by the book is not complicated as such. Yet, the manner in which the argument is constructed is a theoretically and doctrinally intricate fabric of several EU related dimensions, woven together in the light of literature and case law. It is argued that EU constitutionalism is driven by the meta-rationale of security so that the idea of security (broadly understood) lies at the heart of European constitutional identity. In other words, EU constitutionalism ought to be conceived so that security is in a key-position in our attempt to conceptualize the whole EU legal order. Fichera underlines the significance of the AFSJ, which is conceived as “an overarching aspiration of the EU as whole”. The AFSJ is regarded as the most important recent development in European constitutionalism, i.e. not merely an area of

EU law but something that cuts across several areas of EU law. The theoretical assumption behind this underlying view is premised in the idea that the EU is both a polity and a legal system.

The idea of “discursive constituent power” is key to the author’s argument, meaning that both State-centric and federalist theories are rejected. Instead, a heterarchical paradigm is embraced, since it is viewed as more suitable and effective for the discussion on the European project. Interestingly, Fichera distinguishes two main discourses that are intertwined: security and fundamental rights.

The author rejects neutrality and cloaking political dimensions, as this downplays the inherent conflicts and tensions. Consequently, the EU is about law and politics at the same time; hence, it would be wrong for EU scholars not to bring these two dimensions into the daylight. This idea is visible when Fichera analyses and criticizes the principle of proportionality by combining integration theory and case law analysis. For this book, proportionality is particularly crucial, because it is seen as an ideal expression of the tension between security and fundamental rights. Essentially, what is criticized is judicial decision-making that tries to separate moral and political considerations from legal considerations. It is argued that conflicts imply moral choices. In practice, Fichera warns judges of becoming mere custodians of a privileged order. Altogether, the author asserts that judicial balancing of proportionality looks problematic in the case law of the ECJ.

When dealing with the meta-rationale of security, the book relies on a very broad notion of security and takes into account various dimensions. These are labelled as spatial, temporal, ontological, popular, and epistemic. The author claims that the present situation is unique because all of the separate dimensions are challenged simultaneously. Thus, we have the refugee crisis, the rule of law crisis, the financial and economic crises, the constitutional crisis, the boundaries crisis, and the Brexit crisis. Against the backdrop of crises, Fichera seeks to expose the hidden contradictions and ambiguity inherent in the security meta-rationale. Even though the analysis of this book is almost overly theoretical, the argument is relatively uncomplicated: contradictions should be openly recognized. In short, “the moment has come to face political conflict and address it directly, rather than conceal it behind the veil of neutrality”. Ultimately, this is a call to all EU scholars to get off the fence.

In practice, this would mean concurrently a shift in constitutionalism from seemingly neutral vocabulary of technocracy towards “a form of communal constitutionalism”. The suggested step towards communal constitutionalism goes through the reflexive or semantic dimension of security. To make a complicated argument simple, Fichera argues that other models that deal with the nature and functioning of the EU do not really take into account the role of security and fundamental rights discourses when they address the development of the European project. Nevertheless, we should not abandon the vocabulary of constitutionalism and this is why the idea of communal constitutionalism is proposed. The underlying idea is, again, slightly complicated; but what is suggested, is straightforward: “Communal constitutionalism attempts to convert the abstract language of threat, which is intimately connected with the abstract language of universalism, into concrete measures at the local level”.

Communal constitutionalism concerns how the EU relates to local circumstances and national peculiarities. Therefore, “EU law should not be oblivious to the peculiarities of national and subnational social and cultural contexts”. What is more, Fichera goes further and places security and fundamental rights at centre-stage as discourses of power that offer possibility of empowerment both for the EU citizen and the EU as a collective identity.

Overall, the key argument is rather convincing. However, one cannot help but wonder whether the idea of communal constitutionalism needs to be based on the assumption of security as a meta-rationale. In other words, are the fine-drawn theoretical and doctrinal analyses necessary in order to end up with the meta-constitutional idea of communality? Accordingly, one may ask if the analyses relied upon fully support the final argument on communal constitutionalism. Further, the way that the concept of security is regarded as “an existential notion” and not only as a part of constitutionalism discourse, seems an over-interpretation for the purpose of this book.

Even though the book is in parts rather abstract and deals with complicated theoretical questions about the nature of the European project, it is clearly written and accessible. There is also an element of audacity involved. There are not many who would boldly carry the burden of answering why European integration takes place. Given the above, it seems that the author does succeed in doing what he sets out to do i.e. to understand the nature of the EU as an autonomous polity. Fichera's book is an original contribution to the field, which will – without a shadow of doubt – be viewed by members of the target audience with a great interest.

Jaakko Husa
Helsinki